MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–411–90
HARUN HASHIM AND JEMURI SERJAN SCJJ AND WAN YAHYA J
5 SEPTEMBER 1992

Civil Procedure *— Functus officio — Setting aside order for sale of charged land — Whether judge was functus officio in setting aside order after completion of public auction pursuant to order and issue of certificate of sale to successful purchaser*

Land Law *— Charge — Order for sale — Whether order may be set aside by court after public auction pursuant to order completed and certificate of sale issued to successful purchaser — Whether judge was functus officio*

Land Law *— Sale of Land — Sale of charged land by private treaty — Sale made with chargee's consent — Whether purchaser acquires superior interest in land against interest of chargee —Whether sale given full effect by chargee*

The respondent was the registered owner of land in Perak. He obtained a loan from the appellant and as security charged the land to the appellant. The charge was registered. The respondent failed to repay the loan and the appellant, upon the respondent's non-compliance with the statutory notice issued under the National Land Code 1965 ('the Code'), applied to the court for an order for sale of the charged land. The court granted the order for sale on 29 August 1988 and the land was to be sold by public auction. After several unsuccessful attempts to auction the land, the land was eventually sold to one Ng Choon Meng on 24 March 1990 for $110,350. The full purchase price was paid and the registrar issued the certificate of sale by the court on 14 June 1990.

In the meantime, the respondent had approached a buyer (the intervener) for the land and offered to sell the land to him for $105,000. The offer was accepted by the intervener and the appellant consented to the sale on terms. Subsequently on 22 June 1990 the intervener applied to court to intervene in the present proceedings. The learned judge allowed the application and ordered, inter alia, that the public auction of the land held on 24 March 1990 be set aside. The appellant appealed against the judgment.

Held, allowing the appeal:

(1) The auction sale was properly conducted in accordance with the provisions of the Code and the certificate of sale issued on 14 June 1990 was a valid registrable instrument under s 267 of the Code.

(2) Under the Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty but if such a sale is concluded as a purely business arrangement, it is for the chargee to discharge the charge to give full effect to the sale which was not done in this case. The sale by private

A treaty to the intervener did not confer any superior interest in the land in him against the indefeasible interest of the appellant bank.

(3) The application to intervene was not made until a week after the issue of the certificate of sale by which time the auction sale was completed and the learned judge was functus officio. The order for sale is a final order unless appealed against and once it is made, drawn up and perfected, the learned judge is functus officio and therefore has no power to set aside the order for sale.

[Bahasa Malaysia summary

Penentang adalah tuan punya berdaftar tanah di Perak. Ia telah memperoleh suatu pinjaman daripada perayu dan sebagai cagaran telah menggadaikan tanah itu kepada perayu. Gadaian itu telah didaftarkan. Penentang telah gagal membayar balik pinjaman itu dan perayu, apabila penentang tidak mematuhi notis statutori yang dikeluarkan di bawah Kanun Tanah Negara 1965 ('Kanun itu'), telah memohon kepada mahkamah untuk suatu perintah penjualan tanah yang digadaikan itu. Mahkamah telah memberi perintah penjualan itu pada 29 Ogos 1988 dan tanah itu hendaklah dijual melalui lelong awam. Selepas beberapa percubaan yang tidak berjaya untuk melelong tanah itu, tanah itu akhirnya telah dijual kepada Ng Choon Meng pada 24 Mac 1990 dengan harga $110,350. Harga pembelian itu telah dibayar sepenuhnya dan pendaftar telah mengeluarkan sijil penjualan oleh mahkamah pada 14 Jun 1990.

Sementara itu penentang telah berjumpa dengan seorang pembeli tanah itu (si pencelah) dan menawar untuk menjual tanah itu kepadanya dengan harga $105,000. Tawaran itu telah diterima oleh si pencelah dan perayu telah menyetujui penjualan itu dengan beberapa syarat. Kemudiannya pada 22 Jun 1990 si pencelah telah memohon kepada mahkamah untuk dibenarkan mencela di dalam prosiding ini. Hakim yang arif telah membenarkan permohonannya dan memerintahkan, antara lain, bahawa lelong awam tanah itu yang diadakan pada 24 Mac 1990 diketepikan. Perayu telah membuat rayuan terhadap penghakiman itu.

Diputuskan, membenarkan rayuan itu:

(1) Jualan lelong itu telah diuruskan dengan betul mengikut peruntukan Kanun itu dan sijil penjualan yang dikeluarkan pada 14 Jun 1990 itu adalah suratcara yang sah yang boleh didaftarkan di bawah s 267 Kanun itu.

(2) Di bawah Kanun itu, tidak ada apa-apa yang menghalang seorang penggadai dengan persetujuan pemegang gadaian untuk menjual harta yang digadai itu melalui triti persendirian tetapi jika penjualan seperti itu diikat sebagai pengurusan perniagaan semata-mata, adalah terletak pada pemegang gadaian untuk melepaskan gadaian itu untuk memberi kesan sepenuhnya kepada penjualan itu, yang mana tidak dibuat dalam kes ini. Penjualan melalui triti persendirian kepada si pencelah tidak memberi sebarang kepentingan yang lebih tinggi dalam tanah itu kepadanya terhadap kepentingan perayu bank yang tidak boleh disangkal.

(3) Permohonan untuk mencela itu tidak dibuat hingga seminggu selepas pengeluaran sijil penjualan itu dan pada masa itu jualan lelong itu telah diselesaikan dan hakim yang arif adalah functus officio. Perintah penjualan itu adalah perintah muktamad kecuali rayuan dibuat terhadapnya dan sebaik sahaja ia dibuat, disediakan dan dilaksanakan, hakim yang arif itu adalah functus officio dan oleh kerana itu tidak mempunyai kuasa untuk mengetepikan perintah penjualan itu.]

Case referred to
1 *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (folld)

Legislation referred to
Courts of Judicature Act 1964 s 25
National Land Code 1965 ss 256, 257, 258, 259, 267, 340

Appeal from: Originating Motion No 31–676–87 (High Court, Ipoh)

Ngan Siong Hing (*Abbas & Ngan*) for the appellant.
Ramesh Sanghvi (*Kassim Tadin Wai & Co*) for the respondent.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): Cheam Kim Yu ('Cheam') is the registered owner of land held under HS(D) LP 513/83 PT No 1054 in the Mukim of Hutan Melintang, Perak. He obtained a loan of $95,000 from Malayan United Bank Bhd, now known as MUI Bank Bhd ('the bank') and as security for the loan charged the land to the bank on 29 September 1985. The charge was registered. Cheam failed to repay the loan. The bank sent the statutory notice in Form 16D of the National Land Code 1965 ('the Code') dated 5 January 1987 to Cheam to remedy the breach. The said notice expired on 4 February 1987. Cheam failed to remedy the breach. As at 31 January 1987 the outstanding balance of the loan was $124,061.73 with interest to be calculated at the rate of 14.75% pa at yearly rests.

On 16 May 1987 the bank applied to the court for an order for sale of the charged land under s 256. On 29 August 1988 the court granted the order for sale and the auction date was to be held on 16 November 1988. Then several applications followed. On 6 March 1989 the court fixed the reserve price at $100,000 and 27 May 1989 to be the new auction date as the valuation report was not ready for the first auction date. There were no bidders and the auctioneer recommended that the reserve price be reduced to $90,000. This was allowed by the court on 16 October 1989 and a new auction date was fixed for 29 November 1989. The auction was not carried out and a new auction date was fixed for 27 January 1990. The auction again was abortive and a new date was fixed for 24 March 1990. This auction was successful and the property was knocked down to Ng Choon Meng ('Ng') for $110,350. The full purchase price was paid by Ng and the registrar accordingly issued the certificate of sale by the court under s 259 on 14 June 1990.

A It appears that whilst the abovesaid proceedings were going on, other events were taking place. In January 1990, Cheam approached Beh Sai Ming ('Beh') and offered to sell the charged land to Beh at the price of $105,000. Beh agreed. He was also told that as the land was charged to the bank and as the purchase price was insufficient to pay off the outstanding loan in full they had to obtain the consent of the bank for the sale. They B both went to see the branch manager of the bank at Bidor who said he had to obtain clearance from his head office. By letter dated 23 January 1990, the Bidor branch manager wrote to Cheam as follows:

MUI Bank Bhd
23 January 1990
C Our ref: BDR/84/16

Mr Cheam Kim Yu
1, Parit 23 Batu 13
36400 Hutan Melintang
Hilir Perak,
D Perak.

Dear Sir,

Re: Term Loan No TL85/10 for $95,000.
Outstanding balance as at 22 January 1990: $210,907.11 dr

We refer to the above and take pleasure to inform that we are agreeable to your E proposal to dispose the charged property held under Title No: HS(D) LP 513/83 PT No 1054, Mukim of Hutan Melintang by private treaty for $105,000 but subject to the following conditions:

(1) The amount owing after disposal of the charged property is to be remained [sic] in the existing term loan account. You are to execute a letter of arrangement to this effect.
F (2) The shortfall after disposing the charged property is repayable by 120 monthly instalments on condition that the whole principal amount becomes payable and that the bank has the liberty to apply the bankruptcy action against you if you default in the repayment.
(3) The interest rate chargeable on the shortfall is 2% + BLR pa (our BLR is currently at 7%pa).

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All other terms and conditions in our previous letter of offer dated 3 April 1985 remain unchanged.

Kindly indicate your acceptance by signing and returning the copy of this letter to us. Please note that if we do not receive any response from you within fourteen (14) days from the date hereof, we shall henceforth treat the above H arrangement as automatically cancelled and proceed with the bankruptcy proceedings.

Yours faithfully
for MUI Bank Bhd
Bidor Branch.

I Sgd Gan Ching Lock
Branch Manager.

cc Banking Operations Division Zone I.
cc M/s Abbas & Ngan,
Advocates & Solicitors.
(Your ref: NSH/fid/6478/87 MUBB(3)).

In the event, on 27 February 1990 Cheam and Beh entered into a sale and purchase agreement of the charged land together with a shop-house thereon for the sum of $105,000. Beh had paid a sum of $10,500 to the bank's solicitors on 9 February 1990 being 10% of the purchase price which was sent to the bank by letter dated 12 February 1990. The balance sum of $94,500 was to be paid to the solicitors of the bank within three months of 27 February 1990. On execution of the agreement, a copy of which was sent to the bank by its solicitors on 6 March 1990, Cheam delivered vacant possession of the property to Beh. By letter dated 23 May 1990, Cheam agreed to extend the completion date by one month. By letter dated 17 May 1990 Beh's solicitors gave notice to the bank that he intended to restrain the transfer of the property to the purchaser at the public auction. As no reply was received the solicitors sent a reminder by letter dated 11 June 1990 that they would apply to set aside the auction sale. By letter dated 13 June 1990, Beh's solicitors forwarded to the bank's solicitors, a cheque for $94,500 in favour of the bank.

By summons-in-chambers (in the originating summons for an order for sale by the court) dated 22 June 1990, Beh applied to the court to intervene in these proceedings and for an order that the order for sale be set aside. On 25 March 1990 the learned judge made the following orders:

(a) leave to Beh Sai Ming to intervene;
(b) the title of the action be amended to include Beh as intervener;
(c) the public auction sale of the land held on 24 March 1990 be set aside;
(d) the bank to refund to Ng Choon Meng the purchase price within 30 days; and
(e) the bank to pay the costs of Beh's application.

The bank, being dissatisfied with that judgment, now appeals to us against the whole of the judgment on the following grounds:

(1) the learned judge was functus officio when he made the orders on 25 August 1990;
(2) if the learned judge was not functus officio, he could not in any event set aside the auction sale because the sale had been completed in favour of a bona fide purchaser for value without notice of the sale by private treaty; and
(3) non-compliance with s 25 of the Courts of Judicature Act 1964.

Now, the application for an order for sale was made on 16 May 1987 and the court granted the order on 29 August 1988. After three previous dates had been fixed for the auction and either abandoned or aborted, the court ordered the auction to be held on 27 January 1990. However, before that auction date, Cheam and Beh had entered into negotiations to sell and purchase the land by private treaty and the bank gave its consent on 23 January 1990 following which a sale and purchase agreement was executed on 27 February 1990. The auction sale which was to be held on 27 January 1990 was aborted and a new date was fixed for the auction to be held on 24 March 1990 which was successfully held. By then, however, Beh had paid 10% of the purchase price which was accepted by the bank. It will be seen that up to the end of 1989, the bank was following up on its original

application to the court that the land be sold by public auction. The confusion in this case arose in January 1990 when the bank agreed to a sale by private treaty whilst at the same time pursuing its application for sale by the court. In the event both courses of action succeeded.

The question then, in fact and law, is which sale should stand. The learned judge decided in favour of the sale by private treaty on the grounds that:

(a) he was not functus officio for so long as the auction sale has not been completed because the court has the power to vary the auction date and make other interlocutory orders;

(b) a separate action by Beh against the bank to set aside the public auction is not required to avoid multiplicity of proceedings and therefore it was proper for Beh to intervene in the present proceedings initiated by the bank;

(c) the chargee bank had agreed to the sale by private treaty before the public auction and it should not have proceeded with the public auction. A fortiori, the sale by private treaty was by consent of all three parties, viz the chargor, the chargee and the purchaser whereas the sale by public auction was without the consent of the chargor. Furthermore, the conflicting situation created in the instant case was solely the doing of the bank.

What then are the rights of the parties and the powers of the court in the present case?

The application for an order for sale by the chargee bank was properly made under s 256(1) and (2) and the court correctly granted the orders under ss 256(3) and 257. The procedure prior to the sale under s 258 was also complied with. The sale under s 259 is subject to the conditions of sale prescribed under s 258(2)(a) and the directions for sale made by the court on 6 December 1988. Paragraph 5 of the directions for sale states:

> The purchase price or the balance of the purchase price as the case may be, be paid into the court and for payment out of same as follows:
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> (i) to the state or local authority any rent or other outgoings payable;
> (ii) to the Director General of Inland Revenue a sum calculated at the rate at which the tax is payable by the defendants under s 12(5) of the Real Property Gains Tax Act 1976;
> (iii) all costs of and incidental to this application and of the sale and the remuneration of the licensed auctioneer and appraiser as taxed by the senior assistant registrar;
> (iv) to the plaintiffs all moneys due under the charge at the time of the sale.

However, condition 11 of the conditions of sale states:

> The balance of the purchase money shall be paid in by the purchaser within ninety (90) days from the date of the sale to the vendor's solicitors, Messrs Abbas & Ngan. Upon payment of the balance purchase money, the purchaser shall be let into possession of the receipt of the rents and profits of the property. For the purpose of the completion of the purchase and payment of the balance purchase money time shall be the essence of the contract.

In the event, the purchaser (Ng Choon Meng) paid the purchase price to his solicitors (M/s Chia Kay Joo & Co) who in turn by letter dated 16 May 1990 forwarded the balance sum of $99,315 to the bank's solicitors (M/s Abbas & Ngan). It was therefore contended that the auction was irregular and hence void. Condition of sale No 11 would appear to be contrary to the directions of sale issued by the court and s 259(3) which provides:

> The purchaser at the sale shall, upon payment to the said officer of the full amount of the purchase price, ...

There is, however, no evidence that the bank's solicitors did not pay into court the balance of the purchase price. On the other hand, the registrar would not have issued the certificate of sale by the court in Form 16F under s 259 whereby she certified the receipt of the purchase price, if the money had not been paid into court. It was also contended that as the issue document of title was not delivered to the registrar one week before the auction date as required by the directions of sale, this also vitiated the auction sale. Form 16F makes provision for such an eventuality, and this is what the registrar certified. We think there is no merit in these arguments. We are accordingly of the view that the auction sale was properly conducted in accordance with the provisions of the Code to which we have referred and the certificate of sale issued on 14 June 1990 is a valid registrable instrument under s 267.

Under the Code, there is nothing to prevent a chargor with the consent of the chargee to sell the charged property by private treaty. There are no specific provisions in the Code for such a sale but if such a sale is concluded as a purely business arrangement, it is for the chargee to discharge the charge to give full effect to the sale. That was not done here, although the bank must have been aware that it had instructed solicitors to apply to the court for an order for sale of the land by public auction and yet subsequently had given approval for the land to be sold by private treaty to Beh. The sale by private treaty here, however, did not confer any superior interest in the land in Beh against the indefeasible interest of the bank conferred by s 340(1) unless such interest is made defeasible on account of fraud, forgery or illegality on the part of the bank under s 340(2). If Beh wishes to press on with his claims, then he should do so in a separate action: see *Hock Hua Bank Bhd v Sahari bin Murid.*[1]

The application to intervene in the present proceedings was not made until a week after the issue of the certificate of sale by which time the auction sale was completed. The learned judge was clearly functus officio by then. Indeed, following *Hock Hua Bank Bhd v Sahari bin Murid*,[1] the learned judge was functus officio after he made the order for sale on 29 August 1988. In the *Hock Hua* case,[1] the allegations of fraud and forgery were made after the judge had made the order for sale but before the auction sale and the Federal Court held that the judge was functus officio after he made the order for sale in foreclosure proceedings when the order had been drawn up and perfected. True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a *final order* unless

A appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is functus officio and therefore has no power to set aside the order for sale.

Section 25 of the Courts of Judicature Act 1964 deals with the powers of the High Court which have been adequately dealt with in this judgment and we need say no further.

B For the reasons stated, we would allow the appeal with costs here and below. The orders of the learned judge are set aside. Deposit to be refunded to the appellant.

Appeal allowed.

C Reported by Prof Ahmad Ibrahim

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